2008

Nicholas L. Rowe vs. Emily Baird, LDS Family Services, a Utah Corporation : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

NICHOLAS L. ROWE, an individual Petitioner/Appellant, vs. EMILY BAIRD, an individual; LDS FAMILY SERVICES, a Utah Corporation; Does 1-10, Respondents/Appellees.	:	Case No.: 20080424 Priority No. 15

BRIEF OF APPELLEES

Appeal from a Judgment entered in the First Judicial District Court,
Cache County, State of Utah,
Honorable Judge Clint S. Judkins Presiding

Mr. Michael E. Bostwick
M.E. BOSTWICK'S LAW OFFICES, P.C.
6776 South 1300 East
Salt Lake City, UT 84121
Telephone:
Attorneys for Appellant

David M. McConkie (A2154)
David J. Hardy (A5963)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, UT 84111-1004
Telephone: (801) 328-3600
Attorneys for Appellee

IN THE UTAH COURT OF APPEALS OF THE STATE OF UTAH

NICHOLAS L. ROWE, an individual Petitioner/Appellant, vs. EMILY BAIRD, an individual; LDS FAMILY SERVICES, a Utah Corporation; Does 1-10, Respondents/Appellees.	:	Case No.: 20080424 Priority No. 15

BRIEF OF APPELLEES

Appeal from a Judgment entered in the First Judicial District Court,
Cache County, State of Utah,
Honorable Judge Clint S. Judkins Presiding

Mr. Michael E. Bostwick
M.E. BOSTWICK'S LAW OFFICES, P.C.
6776 South 1300 East
Salt Lake City, UT 84121
Telephone:
Attorneys for Appellant

David M. McConkie (A2154)
David J. Hardy (A5963)
KIRTON & McCONKIE
60 East South Temple, Suite 1800
Salt Lake City, UT 84111-1004
Telephone: (801) 328-3600
Attorneys for Appellee

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction over this matter based upon Section 78A-4-103(2) (h) of the Utah Code, as it concerns dismissal of a petition for paternity.

STATEMENT OF ISSUES

1. Did the district court properly conclude as a matter of law that petitioner, the unmarried biological father of a child placed with adoptive parents, failed to demonstrate a timely and full commitment to the responsibilities of parenthood because he did not strictly comply with the terms of Section 78-30-4.14[1] of the Utah Adoption Act.

Standard of Review: "Because summary judgment presents only questions of law, [the court] gives no deference to the district court's legal decisions and [it reviews] them for correctness." *Fordham v. Oldroyd*, 2006 UT App 50, ¶ 6 (*quoting Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶ 10, 100 P.3d 1200).

This issue was raised in respondent's Memorandum of Points and Authorities in Support of Motion for Summary Judgment. [Record ("R.") at 58-68]

2. Did the district court properly conclude as a matter of law that petitioner, the unmarried biological father of a child placed with adoptive parents, waived and surrendered any right which he may have had in relation to the child because he did not strictly comply with the terms of Section 78-30-4.14 of the Utah Code.

---

[1] In 2008, the Utah Legislature recodified Title 78 of the Utah Code, the Judicial Code. The Utah Adoption Act is now found in Title 78B, Chapter 6, Part 1. Although the recodification did not alter the meaning of the Utah Adoption Act, this brief will refer to Code sections according to the Code in effect at the relevant time and as referenced in submissions to the district court.

Standard of Review: "Because summary judgment presents only questions of law, [the court] gives no deference to the district court's legal decisions and [it reviews] them for correctness." *Fordham v. Oldroyd*, 2006 UT App 50, ¶ 6 (*quoting Fericks v. Lucy Ann Soffe Trust*, 2004 UT 85, ¶ 10, 100 P.3d 1200).

This issue was raised by the court during oral argument and addressed in respondent's Supplemental Memorandum of Points and Authorities in Support of Motion for Summary Judgment. [R. at 58-68]

DETERMINATIVE CONSTITUTIONAL AND STATUTORY PROVISIONS

78-30-4.12. Rights and responsibilities of parties in adoption proceedings.

(1) The Legislature finds that the rights and interests of all parties affected by an adoption proceeding must be considered and balanced in determining what constitutional protections and processes are necessary and appropriate.

(2) The Legislature finds that:

(a) the state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, in preventing the disruption of adoptive placements, and in holding parents accountable for meeting the needs of children;

(b) an unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement;

(c) adoptive children have a right to permanence and stability in adoptive placements;

(d) adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child; and

(e) an unmarried biological father has an inchoate interest that acquires constitutional protection only when he demonstrates a timely and full commitment to the responsibilities of parenthood, both during pregnancy and upon the child's birth. The state has a compelling interest in requiring unmarried biological fathers to demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity, in accordance with the requirements of this chapter.

(3) (a) In enacting Sections 78-30-4.12 through 78-30-4.21, the Legislature prescribes the conditions for determining whether an unmarried biological father's action is sufficiently prompt and substantial to require constitutional protection.

(b) If an unmarried biological father fails to grasp the opportunities to establish a relationship with his child that are available to him, his biological parental interest may be lost entirely, or greatly diminished in constitutional significance by his failure to timely exercise it, or by his failure to strictly comply with the available legal steps to substantiate it.

(c) A certain degree of finality is necessary in order to facilitate the state's compelling interest. The Legislature finds that the interests of the state, the mother, the child, and the adoptive parents described in this section outweigh the interest of an unmarried biological father who does not timely grasp the opportunity to establish and demonstrate a relationship with his child in accordance with the requirements of this chapter.

(d) An unmarried biological father has the primary responsibility to protect his rights.

(e) An unmarried biological father is presumed to know that the child may be adopted without his consent unless he strictly complies with the provisions of this chapter, manifests a prompt and full commitment to his parental responsibilities, and establishes paternity.

(4) The Legislature finds that an unmarried mother has a right of privacy with regard to her pregnancy and adoption plan, and therefore has no legal obligation to disclose the identity of an unmarried biological father prior to or during an adoption proceeding, and has no obligation to volunteer information to the court with respect to the father.

78-30-4.14. Necessary consent to adoption or relinquishment for adoption.

(1) Except as provided in Subsection (2), consent to adoption of a child, or relinquishment of a child for adoption, is required from:

(a) the adoptee, if the adoptee is more than 12 years of age, unless the adoptee does not have the mental capacity to consent;

(b) both parents or the surviving parent of an adoptee who was conceived or born within a marriage;

(c) the mother of an adoptee born outside of marriage;

(d) any biological parent who has been adjudicated to be the child's biological father by a court of competent jurisdiction prior to the mother's execution of consent to adoption or her relinquishment of the child for adoption;

(e) consistent with Subsection (3), any biological parent who has executed and filed a voluntary declaration of paternity with the state registrar of vital statistics within the Department of Health in accordance with Title 78, Chapter 45e, Voluntary Declaration of Paternity Act, prior to the mother's execution of consent to adoption or her relinquishment of the child for adoption;

(f) an unmarried biological father of an adoptee, only if he strictly complies with the requirements of Subsections (4) through (8) and (10); and

(g) the person or agency to whom an adoptee has been relinquished and that is placing the child for adoption.

(2) (a) The consent of a person described in Subsections (1)(b) through (g) is not required if the adoptee is 18 years of age or older.

(b) The consent of a person described in Subsections (1)(b) through (f) is not required if the person's parental rights relating to the adoptee have been terminated.

(3) For purposes of Subsection (1)(e), a voluntary declaration of paternity is considered filed when it is entered into a database that:

(a) can be accessed by the Department of Health; and

(b) is designated by the state registrar of vital statistics as the official database for voluntary declarations of paternity.

(4) Except as provided in Subsections (5)(a) and (10), and subject to Subsection (8), with regard to a child who is placed with adoptive parents more than six months after birth, consent of an unmarried biological father is not required unless the unmarried biological father:

(a) (i) developed a substantial relationship with the child by:

(A) visiting the child monthly, unless the unmarried biological father was physically or financially unable to visit the child on a monthly basis; or

(B) engaging in regular communication with the child or with the person or authorized agency that has lawful custody of the child;

(ii) took some measure of responsibility for the child and the child's future; and

(iii) demonstrated a full commitment to the responsibilities of parenthood by financial support of the child of a fair and reasonable sum in accordance with the father's ability; or

(b) (i) openly lived with the child:

(A) (I) for a period of at least six months during the one-year period immediately preceding the day on which the child is placed with adoptive parents; or

(II) if the child is less than one year old, for a period of at least six months during the period of time beginning on the day on which the child is born and ending on the day on which the child is placed with adoptive parents; and

(B) immediately preceding placement of the child with adoptive parents; and

(ii) openly held himself out to be the father of the child during the six-month period described in Subsection (4)(b)(i)(A).

(5) (a) If an unmarried biological father was prevented from complying with a requirement of Subsection (4) by the person or authorized agency having lawful custody of the child, the unmarried biological father is not required to comply with that requirement.

(b) The subjective intent of an unmarried biological father, whether expressed or otherwise, that is unsupported by evidence that the requirements in Subsection (4) have been met, shall not preclude a determination that the father failed to meet the requirements of Subsection (4).

(6) Except as provided in Subsection (10), and subject to Subsection (8), with regard to a child who is six months of age or less at the time the child is placed with adoptive parents, consent of an unmarried biological father is not required unless, prior to the time the mother executes her consent for adoption or relinquishes the child for adoption, the unmarried biological father:

(a) initiates proceedings in a district court of the state of Utah to establish paternity under Title 78, Chapter 45g, Utah Uniform Parentage Act;

(b) files with the court that is presiding over the paternity proceeding a sworn affidavit:

(i) stating that he is fully able and willing to have full custody of the child;

(ii) setting forth his plans for care of the child; and

(iii) agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth;

(c) consistent with Subsection (7), files notice of the commencement of paternity proceedings, described in Subsection (6)(a), with the state registrar of vital statistics within the Department of Health, in a confidential registry established by the department for that purpose; and

(d) offered to pay and paid a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability, unless:

(i) he did not have actual knowledge of the pregnancy;

(ii) he was prevented from paying the expenses by the person or authorized agency having lawful custody of the child; or

(iii) the mother refuses to accept the unmarried biological father's offer to pay the expenses described in this Subsection (6)(d).

(7) The notice described in Subsection (6)(c) is considered filed when it is entered into the registry described in Subsection (6)(c).

(8) Consent of an unmarried biological father is not required under this section if:

(a) the court determines, in accordance with the requirements and procedures of Title 78, Chapter 3a, Part 4, Termination of Parental Rights Act, that the unmarried biological father's rights should be terminated, based on the petition of any interested party; or

(b) (i) a declaration of paternity declaring the unmarried biological father to be the father of the child is rescinded under Section 78-45g-306; and

(ii) the unmarried biological father fails to comply with Subsection (6) within ten business days after the day that notice of the rescission described in Subsection (8)(b)(i) is mailed by the Office of Vital Records within the Department of Health as provided in Section 78-45g-306.

(9) Unless the adoptee is conceived or born within a marriage, the petitioner in an adoption proceeding shall, prior to entrance of a final decree of adoption, file with the court a certificate from the state registrar of vital statistics within the Department of Health, stating:

(a) that a diligent search has been made of the registry of notices from unmarried biological fathers described in Subsection (6)(c); and

(b) (i) that no filing has been found pertaining to the father of the child in question; or

(ii) if a filing is found, the name of the putative father and the time and date of filing.

(10) (a) For purposes of this Subsection (10), "qualifying circumstance" means that, at any point during the time period beginning at the conception of the child and ending at the time the mother executed a consent to adoption or relinquishment of the child for adoption:

(i) the child or the child's mother resided, on a permanent or temporary basis, in the state of Utah;

(ii) the mother intended to give birth to the child in the state of Utah;

(iii) the child was born in the state of Utah; or

(iv) the mother intended to execute a consent to adoption or relinquishment of the child for adoption:

(A) in the state of Utah; or

(B) under the laws of the state of Utah.

(b) For purposes of Subsection (10)(c)(i), a court shall consider the totality of the circumstances when determining whether an unmarried biological father has demonstrated a full commitment to his parental responsibilities, including, if applicable:

(i) efforts he has taken to discover the location of the child or the child's mother;

(ii) whether he has expressed or demonstrated an interest in taking responsibility for the child;

(iii) whether, and to what extent, he has developed, or attempted to develop, a relationship with the child;

(iv) whether he offered to provide and, if the offer was accepted, did provide, financial support for the child or the child's mother;

(v) whether, and to what extent, he has communicated, or attempted to communicate, with the child or the child's mother;

(vi) whether he has filed legal proceedings to establish his paternity of, and take responsibility for, the child;

(vii) whether he has filed a notice with a public official or agency relating to:

(A) his paternity of the child; or

(B) legal proceedings to establish his paternity of the child; or

(viii) other evidence that demonstrates that he has demonstrated a full commitment to his parental responsibilities.

(c) Notwithstanding the provisions of Subsections (4) and (6), the consent of an unmarried biological father is required with respect to an adoptee who is under the age of 18 if:

(i) (A) the unmarried biological father did not know, and through the exercise of reasonable diligence could not have known, before the time the mother executed a consent to adoption or relinquishment of the child for adoption, that a qualifying circumstance existed;

(B) before the mother executed a consent to adoption or relinquishment of the child for adoption, the unmarried biological father fully complied with the requirements to establish parental rights in the child, and to preserve the right to notice of a proceeding in connection with the adoption of the child, imposed by:

(I) the last state where the unmarried biological father knew, or through the exercise of reasonable diligence should have known, that the mother resided in before the mother executed the consent to adoption or relinquishment of the child for adoption; or

(II) the state where the child was conceived; and

(C) the unmarried biological father has demonstrated, based on the totality of the circumstances, a full commitment to his parental responsibilities, as described in Subsection (10)(b); or

(ii) (A) the unmarried biological father knew, or through the exercise of reasonable diligence should have known, before the time the mother executed a consent to adoption or relinquishment of the child for adoption, that a qualifying circumstance existed; and

(B) the unmarried biological father complied with the requirements of Subsection (4) or (6) before the later of:

(I) 20 days after the day that the unmarried biological father knew, or through the exercise of reasonable diligence should have known, that a qualifying circumstance existed; or

(II) the time that the mother executed a consent to adoption or relinquishment of the child for adoption.

(11) An unmarried biological father who does not fully and strictly comply with the requirements of this section is considered to have waived and surrendered any right in relation to the child, including the right to:

(a) notice of any judicial proceeding in connection with the adoption of the child; and

(b) consent, or refuse to consent, to the adoption of the child.

78-30-4.15. Responsibility of each party for own actions — Fraud or misrepresentation.

(1) Each parent of a child conceived or born outside of marriage is responsible for his or her own actions and is not excused from strict compliance with the provisions of this chapter based upon any action, statement, or omission of the other parent or third parties.

(2) Any person injured by fraudulent representations or actions in connection with an adoption is entitled to pursue civil or criminal penalties in accordance with existing law. A fraudulent representation is not a defense to strict compliance with the requirements of this chapter, and is not a basis for dismissal of a petition for adoption, vacation of an adoption decree, or an automatic grant of custody to the offended party. Custody determinations shall be based on the best interest of the child, in accordance with the provisions of Section 78-30-4.16.

(3) The Legislature finds no practical way to remove all risk of fraud or Misrepresentation in adoption proceedings, and has provided a method for absolute protection of an unmarried biological father's rights by compliance with the provisions of this chapter. In balancing the rights and interests of the state, and of all parties affected by fraud, specifically the child, the adoptive parents, and the unmarried biological father, the

Legislature has determined that the unmarried biological father is in the best position to prevent or ameliorate the effects of fraud and that, therefore, the burden of fraud shall be borne by him.

STATEMENT OF THE CASE

Nature of the Case

Petitioner commenced this action by filing a Verified Petition for Paternity and Contesting Adoption ("Petition") on August 31, 2007. [R. at 3-31] With the Petition, he sought to establish his parental rights and gain custody of a child born to respondent Emily Baird five months earlier, on March 29, 2007, and relinquished by Ms. Baird to respondent LDS Family Services for adoption on April 22, 2007. [R. at 70-73] Respondents moved for summary judgment, seeking dismissal of the Petition based upon petitioner's failure to file in a timely fashion. [R. at 58-68, 88-89] The court granted respondent's Motion on March 17, 2008, and it entered its Order of Dismissal on April 16, 2008. [R. at 255-62] This appeal followed.

Statement of Facts

Respondent Emily Baird is the mother of a baby girl born March 29, 2007 in Logan, Utah. [R. at 70-73] Petitioner Nicholas Rowe, an Idaho resident, is the biological father of the child. [R. at 5]

Conception was the result of a single act of sexual activity between Mr. Rowe and Ms. Baird which took place in July 2006 in Pocatello, Idaho. [R. at 5] Although Ms. Baird and Mr. Rowe had been dating prior to that time, Ms. Baird has asserted that she did not consent to the sexual activity; Mr. Rowe denies this. Because, however, of the circumstances surrounding the conception, the communication between Mr. Rowe and

Ms. Baird was limited during her pregnancy. Communication was primarily through text messaging and intermediaries, including relatives and Church leaders. [R. at 5-10]

Despite the limits on communication, it is undisputed that Mr. Rowe was aware of Ms. Baird's pregnancy by November 2006. [R. at 5, 59, 78-80] He was also aware that Ms. Baird was considering placing her child for adoption. [R. at 5, 59, 78-80]

Mr. Rowe has asserted that he was not notified when the child was born. [R. at 8-9] He admits, however, to learning of the birth by April 14, 2007. [R. at 59, 81-82] He further admits that on that date he was made aware that the child had been born in Utah, as he called the hospital in Logan on that date to inquire about the birth. [R. at 59, 83]

Eight days after Mr. Rowe learned of the birth, on April 22, 2007, Ms. Baird relinquished the child to LDS Family Services for adoption. [R. at 59, 70-73] In connection with the relinquishment, LDS Family Services checked the putative father registries for both Utah and Idaho; these revealed no filings by Mr. Rowe. LDS Family Services placed the child with adoptive parents, with whom she has resided since that time.

In May 2007, at the request of Mr. Rowe and with the the consent of LDS Family Services, DNA testing was performed to determine whether Mr. Rowe was the child's biological father. [R. at 60, 84, 87] The testing, which was paid for by LDS Family Services, concluded that Mr. Rowe was the father of the child. [R. at 60]

Although Mr. Rowe received the results of the testing in May, he waited until August 31, 2007, to file the present action. [R. at 3] He has not filed an action in Idaho to establish paternity of the child. [R. at 60, 87].

SUMMARY OF ARGUMENT

Pursuant to the Utah Adoption Act, Utah Code Ann. § 78-30-1 *et seq.*, the unmarried biological father of a child placed for adoption has only an "inchoate interest." Utah Code Ann. § 78-30-4.12(2)(e). If he desires to exercise parental rights, he must strictly comply with the terms of the Adoption Act in order demonstrate his commitment to parenthood. *Id.* While the application of the Adoption Act can be harsh, both the Utah State Legislature and courts addressing it have adopted and upheld its provisions. They have done so based upon the interests of the State, the mother and the child in prompt and secure adoptive placements. A "firm cutoff date is reasonable, if not essential" for stable adoptive placements. *Sanchez v. L.D.S. Social Services,* 680 P.2d 753, 755 (Utah 1984). Only with such a cutoff can birth mothers and adoptive parents can make necessary decisions in a timely fashion.

For a child less than six months old at the time of placement, the Adoption Act requires that an unmarried biological father do the following: (1) he must file a paternity action; (2) he must sign and file an affidavit stating his plans for the child; (3) he must file notice of his paternity action with the state registrar of vital statistics within the Utah Department of Health; and (4) he must provide financial support in connection with the mother's pregnancy and the child's birth. Utah Code Ann. § 78-30-4.14 (6). Generally, each of these requirements must be satisfied prior to the time the mother relinquishes the child for adoption. *Id.* In some cases, a father is allowed additional time, up to twenty days from the date the father learned of the child's birth in Utah. Utah Code Ann. § 78-30-4.14(10)(c). A father who fails to satisfy these requirements, "is considered to have

waived and surrendered any right in relation to the child." Utah Code Ann. § 78-30-4.14(11).

Petitioner did not strictly comply with the Adoption Act. He waited until more than four months after Ms. Baird's relinquishment to file a paternity action. Based upon his failure, the child was placed with adoptive parents, where she has since resided. Based upon petitioner's failure, the Petition was appropriately dismissed.

In this appeal, Mr. Rowe does not challenge the constitutionality of the Adoption Act. Instead, he argues that there are disputed issues of fact that require an evidentiary hearing. He suggests that there is evidence showing that it was impossible for him to comply with the Adoption Act. The material facts, however, are not in dispute. Mr. Rowe, with full awareness of Ms. Baird's pregnancy and of the child's birth in Utah, did not seek to demonstrate a full commitment to the responsibilities of parenthood until the child was five months old. Only then did he file his Petition, despite ample opportunity to do so in a timely fashion. Thus, his arguments fail, as he was required to strictly comply with the Adoption Act. *See, e.g., In re Adoption of W,* 904 P.2d 1113, 1121 (Utah 1995).

As none of the arguments set forth by petitioner justify his failure to strictly comply with the Adoption Act, the court should affirm the dismissal of his Petition by the district court.

ARGUMENT

Petitioner's claim is governed by the Utah Adoption Act, Utah Code Ann. § 78-30-1 *et seq.*[2] It provides that an unmarried biological father must strictly comply with its terms if he desires either notice of or a right to consent to the adoption of his biological child. In this case, petitioner failed to strictly comply with the Adoption Act, thereby waiving and surrendering any rights he might have had in relation to the child. Utah Code Ann. § 78-30-4.14(11). Based on this failure, the district court properly dismissed his Petition as a matter of law.

I. PETITIONER DID NOT DID NOT STRICTLYCOMPLY WITH THE ADOPTION ACT; THEREFORE, THE DISTRICT COURT PROPERLY DISMISSED HIS PETITION.

A. Statutory Standards

The rights and responsibilities of persons involved in the adoption of a child are set forth by Section 78-30-4.12(2) of the Adoption Act. Its provisions apply specifically to children born outside of a marriage. It states: "[T]he state has a compelling interest in providing stable and permanent homes for adoptive children in a prompt manner, [and] in preventing the disruption of adoptive placements . . . ." Subsection (a). The "unmarried mother, faced with the responsibility of making crucial decisions about the future of a newborn child, is entitled to privacy, and has the right to make timely and appropriate decisions regarding her future and the future of the child, and is entitled to assurance regarding the permanence of an adoptive placement." Subsection (b). The child has "a

[2] As noted above, this brief will refer to pertinent Code sections using numbering in place at the time of the events in question and as cited in respondents' Motion for Summary Judgment.

right to permanence and stability in adoptive placements." Subsection (c). The "adoptive parents have a constitutionally protected liberty and privacy interest in retaining custody of an adopted child." Subsection (d).

By contrast, an unmarried father, has only "an inchoate interest that acquires constitutional protection only when he demonstrates a *timely and full commitment to the responsibilities of parenthood*, both during pregnancy and upon the child's birth." Subsection (e) (emphasis added). Accordingly, the "state has a compelling interest in requiring unmarried biological fathers to demonstrate that commitment . . . by establishing legal paternity in accordance with the requirements of this chapter." *Id.*

Statutory standards are applied to determine whether the unwed father's conduct "is sufficiently prompt and substantial to require constitutional protection" of his interest. Utah Code Ann. § 78-30-4.12(3)(a). If the father fails timely to grasp his opportunity for legal rights through strict compliance with statutory procedures, "his biological parental interest may be lost entirely." Subsection (b). "A certain degree of finality is necessary in order to facilitate the state's compelling interest" in providing prompt and permanent placements for adoptive children. Therefore, "the interests of the state, the mother, the child, and the adoptive parents . . . *outweigh the interest of an unmarried biological father who does not timely grasp the opportunity* to establish" his parental rights in accordance with statutory requirements. Subsection (c) (emphasis added). The unmarried father "has the primary responsibility to protect his rights," and he "is presumed to know that the child may be adopted without his consent unless he *strictly*

complies with" statutory requirements to establish his rights. Subsections (d) and (e) (emphasis added).

In a case such as the present, involving a newborn child placed with adoptive parents within a month after birth, an unwed father seeking to assert rights, including those of notice and consent to the adoption, must "strictly compl[y]" with the requirements of Section 78-30-4.14 (6) of the Adoption Act. Utah Code Ann. § 78-30-4.14 (1)(f) and (6). These require the father to demonstrate his full commitment to parental responsibilities by doing the following:

- "[I]nitiat[ing] proceedings in a district court of the state of Utah to establish paternity. . .;
- [F]il[ing] with the court that is presiding over the paternity proceeding a sworn affidavit: (i) stating that he is fully able and willing to have full custody of the child; (ii) setting forth his plans for care of the child; and (iii) agreeing to a court order of child support and the payment of expenses incurred in connection with the mother's pregnancy and the child's birth . . .;
- [F]il[ing] notice of the commencement of paternity proceedings . . . with the state registrar of vital statistics within the Department of Health . . .; and
- [O]ffering to pay and pa[ying] a fair and reasonable amount of the expenses incurred in connection with the mother's pregnancy and the child's birth, in accordance with his financial ability.

Utah Code Ann. § 78-30-4.14(6). Generally he must satisfy these requirements, "prior to the time the mother executes her consent for adoption or relinquishes the child for adoption." *Id.* However, for out-of-state fathers who learn of the child's birth in Utah shortly before the mother's relinquishment, compliance may be demonstrated, "before the

later of: (I) 20 days after the day that the unmarried biological father knew, or through the exercise of reasonable diligence should have known [of the Utah birth]; or (II) the time that the mother executed a consent to adoption or relinquishment of the child for adoption." Utah Code Ann § 78-30-4.14(10).

The penalty for lack of strict compliance is forfeiture of the father's rights. Section 78-30-4.14 (11) states:

> An unmarried biological father who does not *fully and strictly* comply with each of the conditions provided in this section, is considered to have *waived and surrendered any right* in relation to the child, including the right to:
> (a) notice of any judicial proceedings in connection with the adoption of the child, and
> (b) consent, or refuse to consent, to the adoption of the child. [emphasis added]

Accordingly, an unwed father who fails to comply strictly with these statutory requirements has no rights in relation to the child.

B. Case Precedent

Although recognizing that its results are at times harsh, Utah appellate courts have consistently upheld the strict enforcement and constitutionality of the Adoption Code. For example, in *Sanchez v. L.D.S. Social Services*, 680 P.2d 753 (Utah 1984), an unwed father visited the mother and child in the hospital and "assumed the three of them would eventually live together." *Id.* at 755. Later that day, the mother relinquished the child for adoption, and the father attempted to register his paternity, but he registered one day late. He challenged the adoption on the basis that he did not know of the statutory registration requirement. The Utah Supreme Court rejected his claim, concluding that, "there is no constitutional requirement that [an unwed father receive] actual notice of the statutory

requirements for establishing paternal rights." *Id.* Moreover, "[i]t is of no constitutional importance that Sanchez came close to complying with the statute. Because of the nature of subject matter dealt with by the statute, a firm cutoff date is reasonable, if not essential." *Id.* The Court also rejected the notion that a hearing should be held in every case to determine "the degree of the father's diligence and sincerity in trying to establish his parental rights," noting that such factors "are foreign to the statutory provisions," and such a process would disrupt the adoption system with "protracted litigation," causing "incalculable" and possibly "incurable" harm to the infants involved. *Id.* The Court concluded that unwed fathers may fairly be required to comply with statutory requirements:

> It is not too harsh to require that those responsible for bringing children into the world outside the established institution of marriage should be required either to comply with those statutes that accord them the opportunity to assert their parental rights or to yield to the method established by society to raise children in a manner best suited to promote their welfare.

Id. at 756; *see also Wells v. Children's Aid Society*, 681 P.2d 199, 201-02 (Utah 1984) (acknowledgment of paternity mailed prior to mother's relinquishment but not received by Department of Health until after relinquishment was too late to establish father's rights); *Swayne v. L.D.S. Social Services*, 795 P.2d 637, 640 (Utah 1990) ("When an illegitimate child is relinquished by its mother, the rights of the father are automatically terminated unless he has previously filed an acknowledgment of paternity.").

An unwed father's known opposition to adoption neither establishes his rights nor prevents the mother from relinquishing the child. In the case of *In re Adoption of B.B.D.*, 984 P.2d 967 (Utah 1999), a nonresident unwed father expressed opposition to the

proposed adoption, but he took no legal action until after the mother's relinquishment, when he intervened in the adoption proceeding. Reaffirming the constitutionality of the adoption statutes, as discussed above, the Supreme Court held that the father "lost any parental right or interest to" his child by failing to establish paternity in compliance with the statutes. *Id.* at 970. By engaging in a sexual relationship with the mother, the unwed father "is deemed to be on notice that a pregnancy and an adoption" may occur; moreover, "it becomes his responsibility to protect his own rights." *Id.* at 971. "[A]n informal acknowledgment of paternity" or expressed opposition to adoption is insufficient to protect his rights. *Id.* at 972. *See also Swayne v. L.D.S. Social Services, supra*, at 641 ("a father who informally acknowledges his responsibility . . . may later deny paternity and possibly avoid legal liability for his child's care").

Neither is the untimely filing of a paternity action alone sufficient to establish the unwed father's rights. In *Beltran v. Allan*, 926 P.2d at 892 (Utah App. 1996), the unwed father, a California resident, expressed opposition to the proposed adoption and commenced a paternity action in California prior to the mother's relinquishment in Utah. However, the court held that these actions did not relieve the father of strict compliance with Utah law: "[T]he statutes demand *strict compliance* with the notice of paternity requirement and not even substantial compliance will suffice." *Id.* at 896 (emphasis added). "Utah law requires strict compliance to provide certainty and finality to adoptions so that the parties involved, especially the child, are not compromised." *Id.* at 898. Because the father failed strictly to comply with the law, he was barred from contesting the adoption. *See also In re Adoption of W*, 904 P.2d 1113, 1121 (Utah App.

1995) (unwed father "forfeited" his parental rights by failure timely to register his claim of paternity).

C. Application of Law to Petitioner

Based on the pertinent statutes and governing precedent, Mr. Rowe has no parental rights. The undisputed facts demonstrate that he was fully aware of Ms. Baird's pregnancy and her consideration of adoption. [R. at 5, 59, 78-80] Although he contends that he was not made immediately aware of the child's birth, he admits to learning of it by April 14, 2007. [R. at 59, 81-82]. He also learned on that date that the child had been born in Logan, Utah. [R. at 59, 83]

Ms. Baird signed her Relinquishment in favor of LDS Family Services on April 22. [R. at 59, 70-73] The child was then placed with adoptive parents. Mr. Rowe does not assert that he strictly complied with the Adoption Act. He did not file a paternity action prior to Ms. Baird's relinquishment or within twenty days of learning that the child had been born in Utah. [R. at 3, 59-60] Likewise, he did not file a paternity action when DNA testing showed that he was the child's biological father. [R. at 3, 59-60] Instead, he waited until August to file a paternity action. [R. at 3] Because he did not file in a timely fashion, he "waived and surrendered any right in relation to the child." Utah Code Ann. § 78-30-4.14 (11); *see also In re Adoption of W, supra*, 904 P.2d at 1123.

Non-compliance with the Adoption Act disqualifies an unmarried biological father from asserting parental rights. The Adoption Act repeatedly stresses the need for strict compliance, Utah Code Ann. §§ 78-30-4.12 (3), 78-30-4.14 (1) (f), and courts have confirmed that "requiring strict compliance with the adoption statutes is reasonable

because of the nature of adoptions." *In re Adoption of W, supra*, 904 P.2d at 1121 (Utah Ct. App. 1995)(citing *Sanchez, supra*, 680 P.2d at 755).

Because Mr. Rowe did not strictly comply with the Adoption Act, the district court properly dismissed his Petition. This court should affirm that dismissal.

II. PETITIONER HAS NOT PRESENTED A DISPUTE OF MATERIAL FACT SUFFICIENT TO OVERCOME SUMMARY JUDGMENT.

Unable to present evidence that he strictly complied with the Adoption Act, Mr. Rowe makes several arguments, none of which are persuasive or supported by pertinent law. Significantly, he does not present an argument challenging the constitutionality of the Adoption Act. Rather, he argues based on the terms of the Act.

A. Mr. Rowe had Actual Knowledge that the Child was Born in Utah.

Mr. Rowe first argues that he has presented facts sufficient to overcome summary judgment. Although he does not specifically identify a factual dispute, he asserts that he, "was not given an opportunity to present evidence that he could not reasonably have expected to have been born in Logan Utah [sic]." [Brief of Appellant, p. 34]

There was, however, no reason for the court to consider such evidence. By Mr. Rowe's admission, he was aware of the child's birth in Logan before Ms. Baird's relinquishment. [R. at 59, 81-83] Thus, he had actual knowledge of the birth. Based on his knowledge, there is no need to consider whether he might have expected the child to be born in Logan.

B. Mr. Rowe had Ample Time to Comply with the Requirements of the Utah Adoption Act.

Mr. Rowe also complains that it took him sixteen days to learn of the birth and that he "had just five business days" to comply with the Adoption Act. [Brief of Appellant, p. 35] This is inaccurate. Even if the court accepts Mr. Rowe's version of events, as it must in addressing the grant of summary judgment, the Adoption Act anticipates the possibility that an out-of-state biological father would learn of the child's birth in Utah shortly before a birth mother's relinquishment. Such circumstances are governed by Section 78-30-4.14(10). It provides that the "unmarried biological father" may comply with the requirements of Subsection . . . (6) before the later of: (I) 20 days after the day that the unmarried biological father knew, or through the exercise of reasonable diligence should have known, that a qualifying circumstance existed; or (II) the time that the mother executed a consent to adoption or relinquishment of the child for adoption." Utah Code Ann. § 78-30-4.14(10)(c)(ii).

Mr. Rowe became aware of a "qualifying circumstance" when he learned on April 14 that the child "was born in the State of Utah." Utah Code Ann. § 78-30-4.14(10)(a)(iii). Therefore, based upon facts that he has admitted, he had twenty days from April 14 to comply with the statutory requirements. As has been noted, he failed to so do.

On this point, it should be noted that Utah appellate courts have held, in a similar context, that allowing a father ten days to comply with the Adoption Act is constitutionally permissible. In *In re Adoption of W*, *supra*, 904 P.2d at 1122, the Utah Court of Appeals evaluated a prior version of the Act, which required a putative father to register notice of paternity within ten days after it became possible for him to do so. *Id.*

The court held that this period, "while short, is not impermissibly short." *Id.* Applying this to the present case, the twenty days which Mr. Rowe had was not impermissibly short. He had ample time to act.

C. Mr. Rowe's Allegations of Deception Do Not Present a Dispute of Material Fact.

Finally, in suggesting that there is a dispute of material fact sufficient to overcome summary judgment, Mr. Rowe argues that Ms. Baird deceived him and that she was aware of his desire to raise the child. Neither of these points presents a dispute of material fact. As to the former, the Adoption Act provides that, "the unmarried biological father is in the best position to prevent or ameliorate the effects of fraud and that, therefore, the burden of fraud shall be borne by him." Utah Code Ann. § 78-30-4.15(3). He is, "responsible for his own actions," Utah Code Ann. § 78-30-4.15(1), and "presumed to know that the child may be adopted without his consent unless he strictly complies with the [Adoption Act], manifests a full commitment to his parental responsibilities, and establishes paternity." Utah Code Ann. § 78-30-4.12(3)(e). Therefore, "[a] fraudulent representation is not a defense to strict compliance with the requirements of this chapter, and is not a basis for dismissal of a petition for adoption, vacation of an adoption decree, or an automatic grant of custody to the offended party." Utah Code Ann. § 78-30-4.15(2). Based on these provisions, any alleged deception is immaterial.

As to the latter issue, this was addressed by the court the case of *In re Adoption of B.B.D.*, 984 P.2d 967 (Utah 1999). It held that a nonresident unwed father who expressed

opposition to the proposed adoption, but took no legal action until after the mother's relinquishment, "lost any parental right or interest to" his child by failing to establish paternity in compliance with the statutes. *Id.* at 970. Thus, "an informal acknowledgment of paternity" or expressed opposition to adoption is insufficient to protect a father's rights. *Id.* at 972. *See also Swayne v. L.D.S. Social Services, supra*, at 641.

In light of the pertinent statutes and governing cases, there is no dispute of material fact in this case. The district court properly granted summary judgment based on Mr. Rowe's admitted knowledge of the child's birth in Utah and his failure to take action to establish his rights for more than four months.

III. PETITIONER DID NOT DEMONSTRATE A FULL COMMITMENT TO HIS PARENTAL RESPONSIBILITIES BECAUSE HE DID NOT COMPLY WITH THE REQUIREMENTS OF THE ADOPTION ACT.

Mr. Rowe next argues that the district court's decision was incorrect because he demonstrated a full commitment to his parental responsibilities. In so doing, he refers to various factors, including his Idaho residency, his expressed desires to parent the child, and alleged deception by Ms. Baird.

A. A Full Commitment to Parental Responsibilities is Demonstrated by Compliance with the Utah Adoption Act; Mr. Rowe Failed to Comply.

The points presented by Mr. Rowe do not demonstrate or suggest a full commitment to his parental responsibilities. The Adoption Act specifies that unwed fathers, "demonstrate that commitment by providing appropriate medical care and financial support and by establishing legal paternity, in accordance with the requirements

of [the Adoption Act]." Utah Code Ann. § 78-30-4.12(2)(e)(emphasis added). As was demonstrated above, Mr. Rowe did not seek to establish legal paternity in a timely fashion. Therefore, as a matter of law, he did not demonstrate a full commitment to parental responsibilities.

Mr. Rowe also refers to several cases, most notably *Ellis v. Social Services Dep't of Church of Jesus Christ of Latter-Day Saints,* 615 P.2d 1250 (Utah 1980). *Ellis* is notable for its holding that, "when it is impossible for the father to file the required notice of paternity prior to the statutory bar, through no fault of his own, . . . due process requires that he be permitted to show that he was not afforded a reasonable opportunity to comply with the statute." *Id.* At 1256.

Ellis does not apply here. As noted above, Mr. Rowe has admitted to learning on April 14, 2007, that the child had been born in Utah. Under the pertinent statutes, he had twenty days (a constitutionally suitable period) to file a paternity action (with suitable affidavit) and to register notice of that action with the state registrar of vital statistics in the Utah Department of Health. Based on such facts and the applicable law, it was not, as a matter of law, impossible for him to comply with the requirements. In fact, it would have been simple for him to comply. Therefore, no hearing of the sort described by *Ellis* was required.

Mr. Rowe also refers to the dissent in *Osborne v. Adoption Center for Choice,* 2003 UT 15, 70 P.3d 58, which upheld the *Ellis* standard. Significantly, the majority of the Supreme Court concluded in *Osborne* that an out-of-state father had not demonstrated a full commitment to his parental responsibilities. *Id.* ¶34. It held:

> By refusing to comply with the putative father requirements of this state or the state where the mother previously resided, Osborne has placed himself in the position where Utah court's cannot recognize him as an interested individual with rights to challenge an adoption proceeding.

Id.

The same is true here. It remains a requirement of the Utah Adoption Act that an out-of-state father who does not know of a "qualifying circumstance" must comply with "the requirements to establish parental rights in the child, and to preserve the right of notice of a proceeding with the adoption of the child, imposed by (I) the last state where the unmarried biological father knew . . . that the mother resided in . . .; or (II) the state where the child was conceived." *See* Utah Code Ann. § 78-30-4.14(10)(c)(i)(B). In the present case, even if Mr. Rowe could show that he was not aware of the child's birth in Utah, he still would be unable to assert parental rights. Idaho law is similar to that in Utah, requiring that a father seeking to receive notice of adoption proceedings file a paternity action and register with the putative father registry. Idaho Code § 16-1513. Mr. Rowe has not filed a paternity action in Idaho. [R. at 60, 87]

Mr. Rowe next refers to *Swayne v. LDS Social Services,* 795 P.2d 637 (Utah 1990). Like *Osborne*, *Swayne* was a decision adverse to the father. Therefore, it will not support Mr. Rowe's position. The court determined that because the father had not complied with the Adoption Act, he would not be allowed to assert parental rights.

B. Mr. Rowe Admits to Being Aware of a Qualifying Circumstance.

Mr. Rowe also refers to the statutory language defining "qualifying circumstance," asserting that he "did not know and though his reasonable diligence could not have

known, before the time the mother executed a consent to adoption or relinquishment of the child for adoption, that a qualifying circumstance existed in this case." [Brief of Appellant, p. 43] He does so as part of an argument seeking to require a hearing on his commitment to parental responsibilities based on the totality of the circumstances.

This assertion is contrary to the record. Because Mr. Rowe knew on April 14 that Ms. Baird had given birth in Utah, he was aware of a "qualifying circumstance." Utah Code Ann. § 78-30-4.14(10)(a). Therefore, his commitment to parental responsibilities must be judged based on his compliance with the Adoption Act. Utah Code Ann. § 78-30-4.14(10)(c). As Mr. Rowe did not comply with the Act, his argument fails.

C. Mr. Rowe's Ignorance of the Utah Adoption Act Does not Justify his Failure to Comply.

Finally, Mr. Rowe suggests that he should be excused from the statutory requirements because he was not aware of them. This argument, however, is precluded based on *Sanchez, supra,* 680 P.2d at 755. There, the court concluded that, "there is no constitutional requirement that [an unwed father receive] actual notice of the statutory requirements for establishing paternal rights." *Id.*

Put simply, Mr. Rowe cannot demonstrate a commitment to the responsibilities of parenthood. He did not comply with the requirements to do so. His failure is clear. Even after learning of the birth and adoptive placement, he asked for DNA testing. This was permitted, and he was informed in May 2007 that it demonstrated that he was the child's father. Despite this information, he waited until August to file a paternity action.

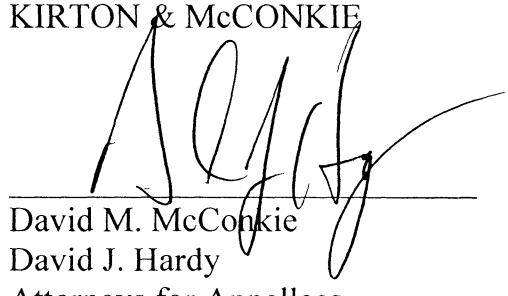
Such delay is inconsistent with a father's commitment to parental responsibilities. The district court properly dismissed the Petition.

CONCLUSION

It is undisputed that Mr. Rowe failed to demonstrate his commitment to parenthood through strict compliance with the terms of the Utah Adoption Act. Although he raises several arguments that he contends justify that failure, none finds support in Utah law. By his failure to comply with the Act, Mr. Rowe waived and surrendered any right which he may have had in relation to the child. As such, the district court properly dismissed his Petition.

Respectfully submitted this 20th day of October 2008.

KIRTON & McCONKIE



David M. McConkie
David J. Hardy
Attorneys for Appellees

CERTIFICATE OF SERVICE

I, the undersigned, certify that on the 20th day of October 2008, I caused two (2) true and correct copies of the foregoing Brief of the Appellant to be forwarded with all required charges prepaid, by the method(s) indicated below, in accordance with the Utah Rules of Appellate Procedure and the Utah Rules of Civil Procedure, to the following person(s):

Michael E. Bostwick
M.E. BOSTWICK'S LAW OFFICES, P.C.
6776 South 1300 East
Salt Lake City, Utah 84121

Attorney for Appellant